

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
ROBERT J. GLADWIN, JUDGE

DIVISION IV

CA06-1131

MAY 16, 2007

BRENDA BRYANT OSBORN, et al.
APPELLANTS

APPEAL FROM THE JACKSON
COUNTY CIRCUIT COURT
[NO. CV 2004-222]

V.

HON. PHILLIP SMITH,
JUDGE

BILLY BRYANT, et al.

APPELLEES

DISMISSED

This appeal is from a declaratory judgment rendered by the Jackson County Circuit Court concerning whether a will not admitted to probate could be used as evidence of a devise of property under Ark. Code Ann. § 28-40-104 (Supp. 2005). The circuit court held that the will could not be used because appellant Brenda Bryant Osborn had filed an affidavit for collection of small estate and attached the will to that affidavit. Osborn and the other appellants raise two points on appeal challenging that ruling. We do not reach the merits of this case because the appeal is not from a final, appealable order as required by Ark. R. App. P.–Civ 2. Therefore, we dismiss this appeal for lack of finality.

The facts are largely undisputed. Lacy Bryant died testate on June 15, 1994, survived by his widow, Naomi Bryant, and eight surviving children.¹ In his will, Bryant left his real property, which consists of a twenty-acre tract upon which his home was situated and a sixty-acre tract, to his wife for the duration of her life and then both tracts to Osborn should she choose to pay \$200 per acre to Bryant's heirs for the sixty-acre tract. The will further instructed that, should Osborn elect not to purchase the property, it would be divided equally between Bryant's children, *per stirpes*.

Following Bryant's death, Osborn filed an "Affidavit for Collection of Small Estate by Distributee" with the Jackson County Circuit Court. The affidavit also attached Bryant's will. The attesting witnesses also executed a "Proof of Will." Finally, a "Notice of Probate" and proof of publication of that notice were also filed on October 14, 1994.

On June 21, 1995, Osborn executed an "Administrator's Deed" to herself. The deed conveyed the property of Lacy Bryant pursuant to the terms of the will, reflecting that Bryant's widow would retain a life estate and the terms by which Osborn could purchase the property upon her mother's death. The deed was duly recorded.

Naomi Bryant lived on the property until her death on November 1, 2004. Upon her mother's death, Osborn decided to purchase the property in accordance with the terms of the will and the deed.

¹In addition to Osborn, Bryant's other surviving children are appellant Opal Garfi, appellant Altha P. Hickman, appellant Gene Bryant, appellee Billy Bryant, appellee Betty Hamby, appellee Dorthea Whitener, and appellee Norma Knight. Appellants Norma Sexton, Linda Bliss, Rita Gilliam, Billy Ray Bryant, and Beverly Beeman are children of Bryant's deceased child O.M. Bryant, as is appellee Mabel Kimberling.

On December 1, 2004, appellees filed the present declaratory-judgment action against Osborn and five other heirs who had accepted her payments, seeking to have the court declare that Lacy Bryant's will was invalid; that the administrator's deed was likewise invalid; and that Lacy Bryant's property should pass in accordance with the laws of intestacy. The complaint also contained two other counts seeking partition of the real estate in the event appellees were successful with their petition for declaratory judgment and seeking damages against Osborn for breach of contract. The complaint was later amended in order to name some omitted heirs as parties. Appellants denied that proper probate procedures were not followed and asserted that Osborn owned the property pursuant to the administrator's deed. Appellants also denied the allegations relating to the partition and breach-of-contract counts.

On June 12, 2006, the trial court filed its written decision, finding that Lacy Bryant's will was never admitted to probate but, nevertheless, could not be used as evidence of a devise because Brenda Osborn's filing of an affidavit of small estates was "a probate proceeding concerning the succession . . . of the estate" under Ark. Code Ann. § 28-40-104(b)(1). The court noted that the small estate procedure was "not intended to provide a means to avoid probate where there is an elevated likelihood of conflict among heirs, there are out-of-state heirs not likely to see the published notice, and the will provides conditions precedent to the transfer of property." The court concluded that Lacy Bryant effectively died intestate. The court reserved the other issues raised in the petition. This appeal followed.

This court's jurisdiction is not invoked until a final order has been entered in the circuit court, with the exception of those immediately appealable orders listed in Ark. R.

App. P.–Civ. 2. Although the parties do not raise the issue, the question of whether an order is final and subject to appeal is a jurisdictional question which the court will raise sua sponte. *Reed v. Arkansas State Highway Comm’n*, 341 Ark. 470, 17 S.W.3d 488 (2000).

Under Rule 54(b) of the Arkansas Rules of Civil Procedure, an order is not final that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *Hambay v. Williams*, 335 Ark. 352, 980 S.W.2d 263 (1998). Rule 54(b) allows a trial court, when it finds no just reason for delaying an appeal, to direct entry of a final judgment as to fewer than all the claims or parties by executing a certification of final judgment as it appears in Rule 54(b)(1). However, absent this required certification, any judgment, order, or other form of decision that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action. *See Jackson v. Delis*, 76 Ark. App. 436, 67 S.W.3d 596 (2002). In the instant case, there is neither a final order disposing of all of the claims nor a Rule 54(b) certification. We therefore do not have jurisdiction to hear this appeal.

Dismissed.

HART and ROBBINS, JJ., agree.